Supreme Court, U.S.
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No. ____

In the
Supreme Court of the United States

Jairo Cardona-Rivera,
Petitioner

vs.

State of Missouri,
Respondent

On Petition for Writ of Certiorari
To the Supreme Court of Missouri
and the Missouri Court of Appeals
For the Southern District

Petition for Writ of Certiorari

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Question Presented for Review

Petitioner, a Colombian National, was convicted of drug trafficking based largely on his admissions to police. The Vienna Convention mandates that a foreign national arrestee be advised of his right to consular assistance. Was trial counsel ineffective in failing to object to the use of petitioner's statements taken by police, who failed to advise petitioner of his Vienna Convention rights?

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Certificate of Service

Petitioner hereby certifies three (3) copies of this petition were sent by first class U.S. mail, on this 15th day of June, 2001 to:

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Opinions Below

On direct appeal, the Missouri Court of Appeals for the Southern District affirmed Cardona-Rivera's conviction and sentence on July 31, 1998. The opinion is reported at 975 S.W. 2d 200 (Mo. App. S.D. 1998) (attached at a1).

Petitioner, pursuant to Missouri Rule 29.15, filed a motion in the circuit court alleging ineffective assistance of counsel. On July 6, 1999, the motion court denied his allegations in an unreported judgment (attached at a20).

Petitioner appealed this denial to the Missouri Court of Appeals for the Southern District. The Court of Appeals denied relief on November 9, 2000 in its reported opinion (attached at a44). The Court of Appeals then denied petitioner's motion for rehearing/transfer on December 4, 2000 (attached a57).

On January 23, 2001, the Supreme Court of Missouri denied a motion for transfer (attached at a58).

Jurisdiction

Petitioner seeks review of

1) the opinion of the Missouri Court of Appeals for the Southern District filed November 9, 2000;

2) the denial of his request for rehearing/transfer by the Missouri Court of Appeals for th Southern District, filed December 4, 2000; and

3) the denial of his motion for transfer by the Missouri Supreme Court, filed January 23, 2001.

The jurisdiction of this court is invoked under 28 U.S.C. §1257(a).

Constitutional Provisions and Treaties Involved

A. Article 36 (1)(b) of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (ratified November 24, 1969):

Article 36(1)(b) of the Vienna Convention provides as follows:

> 1. With view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> . . .
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph [.]

B. Article VI, Sec. 2 of the United States Constitution (a65).

C. The text of the Fifth Amendment of the United States Constitution (a66).

D. The text of the Fourteenth Amendment the United States Constitution (a67).

Statement of the Case

A. *Factual Background and the Trial*

On October 28, 1993, Jairo Cardona-Rivera was the passenger in his Toyota Corolla, which was being driven by Carlos Patino. The two were headed northbound through southeast Missouri on Highway I-55. Troopers Jeffery Heath and Nelson Elfrink of the Missouri State Highway Patrol were on duty that day when Heath noticed that the Toyota Corolla, while passing through a construction zone, was traveling too closely behind a tractor trailer. Trooper Heath then pulled the car over and asked the driver, Carlos Patino, for a driver's license. Patino produced his license. Heath then asked Patino to exit the vehicle and speak to him outside the vehicle. Patino told Trooper Heath that Jairo Cardona-Rivera was the owner of the Toyota Corolla.

Trooper Heath then approached the passenger side of the vehicle and requested identification and registration information.

Jairo Cardona-Rivera produced an Illinois driver's license and Illinois registration for the Toyota Corolla. Trooper Heath returned to his patrol car bringing Patino with him. Patino again confirmed that Cardona-Rivera was owner of the Toyota Corolla. During this conversation, Patino's and Cardona's license and registration checks came back valid.

Trooper Heath walked back to the Toyota Corolla with Patino when he noticed Patino became "nervous" about his question of whether the two were carrying guns or drugs. Trooper Heath then asked for and received permission to search the vehicle from Patino. Trooper Heath then walked to the passenger side of the vehicle, asked Cardona-Rivera to exit and told him that he had permission to search the vehicle. Heath then took the keys from the ignition and opened the trunk. The vehicle was not a hatchback. Inside the trunk, Heath found luggage which contained eight bundles of cocaine. After handcuffing the suspects, Trooper Heath radioed for assistance

and Trooper Elfrink responded. Heath advised Patino of his *Miranda* rights, and Elfrink advised Cardona-Rivera of his *Miranda* rights. Cardona-Rivera then allegedly admitted the cocaine was his.

On Thursday, June 6, 1996, the parties appeared before the Honorable Fred Copeland, Judge of Division One of the Circuit Court of New Madrid County, Missouri for trial.

The prosecutor's case consisted of the testimony of Trooper Jeffery Heath, Trooper Nelson Elfrink, and chemist Deborah Edick. During the testimony of Trooper Heath, the State offered into evidence photographs of and the actual bundles of cocaine.

After its opening statement, the defense called its only witness, Carlos Patino. Patino testified he was hired to deliver packages from Memphis to Chicago. Patino testified all the cocaine in the car was his and that is why he pled guilty in federal court, and that Cardona-Rivera had nothing to do with it.

The defense then rested.

The jury returned and found Cardona-Rivera guilty of trafficking in the first degree.

On July 23, 1996, the court denied Cardona-Rivera's motion for a new trial and acquittal notwithstanding the verdict and sentenced him to thirty years in the Missouri Department of Adult Institutions without possibility of probation or parole.

B. ***Direct Appeal***

Following his jury trial and sentencing, Cardona-Rivera filed his direct appeal in the Missouri Court of Appeals for the Southern District.

The court denied, without ruling on the merits, Cardona-Rivera's point relating to the failure of his counsel to object to the use of his statements taken by the police without first warning Cardona-Rivera of his rights pursuant to the Vienna Convention because such a claim for ineffective assistance of

counsel must be raised under Rule 29.15. *State v. Cardona-Rivera*, 975 S.W.2d 200, 205 (Mo. App. S.D. 1998).

C. ***Rule 29.15 Proceedings***

Following the affirmance of his conviction on direct appeal (after a jury trial), Cardona-Rivera properly filed Case No. CV198-303CC, his original Motion to Vacate, Set Aside or Correct Judgment and Sentence, in the Circuit Court of New Madrid County on October 22, 1998. The motion raised numerous points, including Vienna Convention issue raised here.

The court heard testimony from Mr. Peter Gullborg, Cardona-Rivera's trial counsel, and then from the petitioner.

As to the Vienna Convention issue, Mr. Gullborg admitted he was unaware of the treaty at the time of trial in June, 1996. He admitted he had never spoken to Cardona-Rivera about the Vienna Convention and that as far as he knew, neither had the other public defenders from his office. Long before trial,

Mr. Gullborg called the appellate public defender's office to ask if there was any law he should be aware of when dealing with a foreigner, but was told no. Mr. Gullborg admitted he received a call from a Spanish consulate in Chicago but was unsure of the origin, and the calling party did not return Mr. Gullborg's message. Another public defender had also been contacted more than once by either petitioner's friends or a consulate.

When asked about the Vienna Convention, Mr. Gullborg admitted:

> Had I known of the Vienna Convention, I would have filed whatever the appropriate motion in -- in regard to it would have been. I assume that from what you said it would be a motion to suppress, according to that. But I would have filed the appropriate motion had I known.

When asked what evidence the state had -- other than his statements -- about Cardona-Rivera's knowledge or intent to possess the cocaine found in the trunk, Mr. Gullborg stated "No.

There was no other forensic evidence that I recall. They had no direct evidence other than that [Cardona-Rivera's statements]". Circumstantial evidence included that the car belonged to Cardona-Rivera and that he was a passenger in the car.

As to his failure to raise the Vienna Convention, Mr. Gullborg admitted "yes, I do think it was prejudicial. I can't say to what extent, because --but it was unquestionably prejudicial to some level."

Cardona-Rivera testified he is a native of Cali, Colombia and he was not informed of his rights under the Vienna Convention by police or his attorneys.

By its Judgment filed July 6, 1999, the Rule 29.15 motion court overruled Jairo Cardona-Rivera's Motion to Vacate, Set Aside or Correct the Judgment or Sentence.

D. ***Direct Appeal of Rule 29.15 Proceedings***

On November 9, 2000, the Missouri Court of Appeals for

the Southern District issued its *per curiam* opinion affirming the denial of petitioner's 29.15 ineffective assistance of counsel claims. In finally deciding this point on the merits, the court found that the Vienna Convention issue raised "is a matter of first impression in the State of Missouri" and that the United States Supreme Court has treated this issue as "an open question."

On December 4, 2000, the Court of Appeals denied Petitioner's Motion for Rehearing/Transfer to the Missouri Supreme Court.

E. ***The Missouri Supreme Court***

Petitioner next sought relief in the Missouri Supreme Court due to the international implications of this issue. On January 28, 2001, the Missouri Supreme Court denied petitioner's motion to transfer.

Argument

The issue boiled down is whether trial counsel was ineffective in failing to object to the use of Cardona-Rivera's statements, taken by police without advising him of his rights under the Vienna Convention, and if so, was Cardona-Rivera prejudiced?

Trial counsel Gullborg was unaware of the Vienna Convention. Neither he nor his office ever discussed the issue or raised any motion relating to it. Cardona-Rivera testified that he is a Colombian but was never informed of his Vienna Convention rights by police or defense counsel. To understand how this failure amounted to ineffective assistance, an understanding of the Vienna Convention is required.

Article 36(1)(b) of the Vienna Convention on Consular Relations provides:

> [I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.*

Vienna Convention on Consular Relations, April 24, 1963, [1970] 21 U.S.T. 77, 596 U.N.T.S. 261 (ratified November 24, 1969) (emphasis added) [hereinafter "Article 36" and "the Convention"]. As a treaty made under the authority of the United States, the Vienna Convention is the supreme law of the land. U.S. Const. art. VI, cl. 2.

It is undisputed that the troopers who took the Cardona-Rivera's statements did not inform him of the rights established by Article 36. Therefore, the troopers violated the Vienna Convention.

One of the issues that arises is standing. The government may reason that the right violated by the troopers belonged not to Cardona-Rivera, as an individually affected foreign national, but rather to the Colombian Consulate. Based on this reasoning the government (as it has done in previous cases) would contend that the petitioner lacks standing to complain of the violation. Any such assertion would be without merit. *United States v. Torres-Del Muro*, 1999 WL 515999 (C.D.Ill.); *United States v. Chapparo-Alcantara*,1999 WL 125525 (C.D.Ill); *United States v. Lombera-Camorlinga*, 170 F.3d 1241 (9th Cir. 1999); *United States v. Superville*, 1999 WL 166990 (D. Virgin Islands); *see also*, *Breard v. Greene*, 523 U.S. 371 (per curiam) (stating that the Convention "arguably confers

on an individual that right to consular assistance following arrest.")

While one of the purposes of Article 36 is to "facilitat[e] the exercise of consular functions relating to nationals of the sending State," foreign nationals are more than incidental beneficiaries of Article 36(1)(b). The treaty language itself clearly states that the rights enumerated in sub-paragraph 36(1)(b) belong to the foreign national: "The said authorities shall inform *the person concerned*, without delay of *his rights under this sub-paragraph*." Convention, Article 36(1)(b) (emphasis added). It strains the English language to interpret "his rights" in this context to refer to the Consulate's rights. The Ninth Circuit held in *United States v. Rangel-Gonzales*, 617 F.2d 529, 532 (9th Cir. 1980), that "[t]he right established by the regulation [intended to ensure compliance with the Convention] and in this case by treaty is a personal one."

Moreover, the language of the provision is not precatory, but rather mandatory and unequivocal. *See INS v. Cardoza-Fonseca,* 480 U.S. 421, 441 (1987) (contrasting mandatory obligations and "precatory" provisions under the United Nations Protocol Relating to the Status of Refugees). Accordingly, individual foreign nationals have rights under Article 36(1)(b) of the Vienna Convention.

It has long been recognized that, where treaty provisions establish individual rights, these rights must be enforced by the courts of the United States at the behest of the individual. *See United States v. Rauscher,* 119 U.S. 407, 418-19, (1886) (citing *Head Money Cases,* 112 U.S. 580 (1884)); *see also United States v. Alvarez-Machain,* 504, U.S. 655, 659-60 (1992) (recognizing the continuing authority of *Rauscher*). Because Article 36(1)(b) establishes individual rights, these rights must be enforced by our courts.

In considering this the appropriate remedy for an Article 36 violation, the court should look first to the language of the Article. *See Alvarez-Machain,* 504 U.S. at 663, ("In construing a treaty ... we first look to its terms to determine its meaning.") Article 36(2) provides: "The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must not nullify these rights." Convention, art. 36(2).

Despite the importance of the Vienna Convention, and its status as the supreme law of the land, law enforcement officials continue to overlook the rights Article 36(1)(b) establishes for foreign nationals who are "arrested, in prison, custody or detention." Convention, Art. 36(1)(b). By failing to complain of these violations at trial, however, most individual defendants have "failed to exercise [their] rights under the Vienna Convention in conformity with the laws of the United States."

Breard v. Greene, 523 U.S. 371 (1998). As a result, violations of the Convention have often gone judicially unredressed. *See, e.g., id.* (holding that the Convention claim was procedurally defaulted); *Villafuerte v. Stewart,* 142 F.3d 1124, 1125 (9th Cir.1998) (same); *LaGrand v. Stewart,* 133 F.3d 1253, 1261 (9th Cir.1998) (same).

Trial counsel Gullborg should have exercised Cardona-Rivera's rights with a suppression motion pretrial under the Convention in conformity with our laws. *See Breard v. Pruett,* 134 F.3d 615, 622 (4th Cir.1998) (Butzner, J., concurring) ("The provisions of the Conventions should be implemented before trial when they can be appropriately addressed."). Our laws, in turn, must not nullify his rights as established by Article 36. Irrespective of the requirements of Article 36(2), "[t]he importance of the Vienna Convention cannot be overstated. It should be honored by all nations that have signed the treaty and all states of this nation." *Breard v. Pruett,* 134 F.3d at 622 (J.

Butzner, concurring). Unfortunately, Gullborg was unaware of this important treaty and took no action -- pretrial, at trial, or post trial -- to preserve the issue.

The Vienna Convention on Consular Relations of 1963 has been in effect since the United States Senate ratified the treaty on December 24, 1969. The Convention was certainly in effect at the time of Cardona-Rivera's 1996 trial. Gullborg's failure to raise the Convention issue was not trial strategy; he was not aware of the Convention. When he asked the appellate public defender if they knew of any issue, he was told, no. Whether the issue was novel or not, trial counsel simply did not know the law *at the time of trial.*

The United States Court of Appeals for the Fourth Circuit has considered a similar "novelty" excuse and dismissed it in no uncertain terms. *Murphy v. Netherland*, 116 F. 3d 97 (4th Cir. 1997). Murphy pleaded guilty to a murder, was convicted and sentenced to death in Virginia state court. The federal

district court denied all his claims and rejected his Vienna Convention claim as procedurally defaulted -- it was not raised in state court. 116 F. 3d. at 99. On appeal to the Fourth Circuit, Murphy for the first time claimed the "novelty" of the Vienna Convention precluded him from raising it in state court. In rejecting Murphy's claim, the court held

> However, not only did Murphy never raise his novelty argument in the district court, there is absolutely no cause for his not having done so. The Vienna Convention, which is codified at 21 U.S.T. 77, has been in effect since 1969, and a reasonably diligent search by Murphy's counsel, who was retained shortly after Murphy's arrest and who represented Murphy throughout the state court proceedings, would have revealed the existence and applicability (if any) of the Vienna Convention. Treaties are one of the first sources that would be consulted by a reasonably diligent counsel representing a foreign national. Counsel in other cases, both before and since Murphy's state

proceedings, apparently had and have had no difficulty whatsoever learning of the convention. *See, e.g., Faulder v. Johnson,* 81 F.3d 515, 520 (5th Cir.1996); *Waldron v. I.N.S.*, 17 F.3d 511, 518 (2d Cir.1993); *Miami v. Van Zandt*, No. 89 Civ. 0554, 1989 WL 52308 (S.D.N.Y. May 9, 1989); *United States v. Rangel-Gonzales*, 617 F.2d 529, 530 (9th Cir. 1980); *United States v. Calderon-Medina*, 591 F.2d 529 (9th Cir.1979); *United States v. Vega-Mejia*, 611 F.2d 751, 752 (9th Cir.1979). Indeed, Murphy's primary argument is that "[e]ven the most diligent counsel would have been sorely pressed to recognize the existence" of the Vienna Convention prior to the publication of *Faulder v. Johnson*, 81 F.3d 515 (5th Cir.1996), Appellant's Br. At 22. Apparently unbeknownst to Murphy's appellate counsel, however, Faulder's attorney discovered the Convention prior to the December 2, 1992 filing of Faulder's habeas petition, over a year before Murphy filed his state habeas petition.

* * *

> *The legal basis for the Vienna Convention claim could, as noted above, have been discovered upon a reasonably diligent investigation by his attorney, and the factual predicate for the claim -- that Murphy is a citizen of Mexico -- was obviously within Murphy's knowledge.*

Id. (emphasis added).

The same standard should have applied in this case. Upon a showing that the Vienna Convention was violated by a failure to inform the alien of his right to contact his consulate, Cardona-Rivera would have had the initial burden of producing evidence showing prejudice from the violation of the Convention. This did not happen -- counsel was unaware of the Convention.

Prejudice

To be entitled to relief, movant must also demonstrate that he was prejudiced as a result of trial counsel's errors. To do

so he must demonstrate a reasonable probability that, but for counsel's errors, the outcome of the trial would have been different. *Leisure v. State*, 828 S.W.2d 872 (Mo.banc 1992).

Had trial counsel raised the proper objection at pretrial, the trial court, in addition to determining whether Cardona-Rivera had standing, would have had to decide whether the troopers' failure to advise Cardona-Rivera of this right prejudiced him. At such a hearing, the trial court would have heard:

- Cardona-Rivera is a native of Cali, Colombia
- The troopers who arrested him did not advise him of his rights pursuant to the Vienna Convention
- The State's case relied heavily on an alleged admission by Cardona-Rivera to the arresting troopers that the suitcase in the trunk and its contents -- cocaine -- was his. Cardona-Rivera

made the admission ***after*** he was given *Miranda* warnings

- The only other evidence the state had was weak and circumstantial: the car was his and he was a passenger

There is a likelihood that under these facts, the trial court would have concluded that the failure of the troopers to warn Cardona-Rivera of his rights pursuant to the Vienna Convention violated his rights and he was thereby prejudiced. Undoubtedly, had the Colombian Consulate been contacted, Cardona-Rivera would have been advised to invoke his right to counsel and not make any statement. Unfortunately, trial counsel was unaware of the law and the issue never made its way before the trial court.

As outlined above, the Fourth Circuit had explicitly held that reasonably diligent counsel would look first to treaties when representing a foreigner and that other competent counsel (predating this case) have had no trouble raising the Vienna

Convention issue. *See Murphy v. Netherland*, 116 F.3d 97 (4th Cir. 1997). The appellate courts in Missouri considered this authority, and in their discretion, did not adopt it. Unfortunately, the Missouri opinions give little by way of guidance or explanation in concluding the Vienna Convention does not offer relief to Cardona-Rivera. This case is ripe for review because it encompasses not only the merits of the Convention issue, but whether constitutionally effective counsel must raise it.

Reasons for Granting the Writ

This is a case of first impression in Missouri. The decisions by the state Court of Appeals and Missouri Supreme Court are now the law in this state. The writ should be granted in this case because the federal circuits and state courts throughout the land are struggling with the Vienna Convention. The Eighth Circuit recently framed the issued, but as most courts have done, skirted a decision on the merits:

Courts have been unable to reach a consensus, and often even a decision, on the issues of whether Article 36 creates an individually enforceable right to consular notification, *compare United States v. Lombera-Camorlinga*, 206 F.3d 882, 883 (9th Cir.2000) (en banc) (noting recognition of an individually enforceable right created by Article 36) *and United States v. Briscoe*, 69 F.Supp.2d 738, 746-47 (D.Vi.1999) (holding that Article 36 creates an individually enforceable right) *with United States v. Li*, 206 F.3d 56, 62-65 (1st Cir.2000) (holding that individual defendants are not entitled to raise violations of Article 36 as a defense to criminal prosecution), whether a defendant must show prejudice to vindicate that right if it does exist, *see United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1196 (11th Cir.2000) (per curiam) (holding no remedy exists for an Article 36 violation absent a showing of prejudice); *United States v. Pagan*, 196 F.3d 884, 890 (7th Cir.2000) (upholding denial of mistrial based on Article 36 violation

where the defendant did not show how notice of Article 36 rights would have influenced evidence put to a jury); *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir.1996) (holding Article 36 violations did not merit reversal where the defendant's attorney had access to all information available to his consulate), and what, if any, remedy may be available for such a violation, *see Breard v. Greene*, 523 U.S. at 378-79 (per curiam) (suggesting that, in the absence of a showing of an effect on the trial, violation of the Vienna Convention will not warrant overturning a final judgment); *United States v. Page*, Nos. 99-5361, 99-5449, 99-5451, 99-5456, 2000 WL 1682523 at *3 (6th Cir. Nov.9, 2000) (". . . although some judicial remedies may exist, there is no right in a criminal prosecution to have evidence excluded or an indictment dismissed due to a violation of Article 36"); *State v. Reyes*, 740 A.2d 7, 13-14 (Del.Super.Ct.1999) (granting a motion to suppress evidence because failure to advise the defendant of his Article 36 rights precluded a knowing and

intelligent waiver of *Miranda* rights).

United States v. Santos, 2000 WL 1898812 (8th Cir.2000)

This case presents the issue of whether trial counsel who fails to raise the Convention on behalf of a foreign national defendant is constitutionally effective. While several circuits seem to hold the convention does not extend enforceable individual rights, at least one circuit has condemned trial counsel for failure to raise this treaty on behalf of a foreign national. *See Murphy v. Netherland, supra.* This case presents the opportunity for this Court to definitively resolve this issue in its entirety.

Conclusion

The world is watching. The issue presented is one of great and constitutional significance. The courts, prosecutors and defense attorneys need these questions resolved. Law enforcement needs to know how to properly interrogate foreign

arrestees. Furthermore, American citizens abroad need to know their rights. This issue needs to be resolved, and this court is in a position to do so. Cardona-Rivera now prays this court make a finding that trial counsel was impermissibly ineffective, that he was prejudiced as a result, and reverse his conviction with instructions on the proper application of the Vienna Convention.

Respectfully submitted,

ERKER, NORTON & HARE, L.L.C.

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Appendix to Petition for Writ of Certiorari
Appeal from the Circuit Court of New Madrid County

Missouri Court of Appeals
Southern District
Division One

STATE OF MISSOURI	)	
	)	
Plaintiff-Respondent,	)	
	)	
vs.	)	No. 21157
	)	
JAIRO CARDONA-RIVERA,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF NEW MADRID COUNTY

Honorable Fred W. Copeland, Judge

AFFIRMED

Jairo Cardona-Rivera ("Defendant") was convicted by a jury of attempted trafficking in the first degree, § 195.222.2(2),[1]

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[1]All statutory references are to RSMo Supp. 1993, and all rule references are to Missouri Rules of Criminal Procedure (1996).

and was sentenced as a prior drug offender to thirty years without eligibility for probation or parole. He raises five points of error on this appeal relating to the denial of his motion to suppress; the alleged ineffectiveness of his trial counsel; the exclusion of exculpatory statements allegedly made by him; the alleged failure to provide him with a competent and unbiased interpreter at trial; and the state's reference to him as a Columbian. We affirm.

Defendant does not challenge the sufficiency of the evidence to support the conviction. Viewed in the light most favorable to the verdict, the evidence indicates that Defendant was riding as a passenger in a 1984 Toyota Corolla on October 28, 1993 when it was stopped by Missouri Highway Patrol Trooper Jeffery Heath ("Trooper Heath") after he observed the car following another vehicle too closely. Trooper Heath

noticed fast food wrappers in the car, as well as two maps and an atlas, which he interpreted as an indication that the occupants were traveling without taking time to stop and eat meals. The driver, Carlos Patino ("Patino"), who produced an Illinois driver's license, was asked by Trooper Heath to step to the rear of the vehicle, where he identified Defendant as the owner of the vehicle. Trooper Heath then spoke with Defendant who admitted that he was the vehicle's owner and produced a registration confirming his ownership. Defendant, however, told Trooper Heath that he did not know the driver's name, where the trip originated, or where they were going. Patino also later denied knowing where the trip originated or its intended destination, as well as Defendant's name.

Trooper Heath issued a warning to Patino, returned his license, and told him he was free to go. As they were getting out

of the patrol car, the trooper asked Patino if he had any guns, drugs or weapons in the car. Patino denied that they did, but the trooper thought he seemed nervous. The trooper then sought, and received, permission from Patino to search the car. While Patino waited at the front of the Corolla, Trooper Heath told Defendant that Patino had given him permission to search the car, and asked him to also wait at the front of the car. The trooper found eight bundles of cocaine in the trunk, and placed Defendant and Patino under arrest.

After Defendant was informed of his rights, he identified the suitcase which contained the cocaine as "mine," and said that the contents were "clocaine." When asked if he meant "cocaine," Defendant said that he did. Defendant also said that he and Patino were going to Chicago, that he had been paid $1,000 to make the trip, and that there were six or seven

kilograms of cocaine in the suitcase.

Defendant's only evidence at trial consisted of the testimony of Patino, who said that the cocaine was his, that he did not tell Defendant it was in the car, and that Defendant had merely agreed to drive Patino from Chicago to Memphis and back for $500.

Defendant's first point on appeal is:

> The trial court erred where [sic] it denied [Defendant's] motion to suppress evidence seized following a third-party consent search and the law was not followed because no reasonable police officer could believe he had valid consent to search the car where the true known owner was present and did not give permission.

Defendant's point relates to the denial of his pre-trial motion to suppress physical evidence seized as a result of the search of the

car. The scope of the issue for determination on appeal is that which is framed in the point relied on. ***State v. Talbert***, 873 S.W.2d 321, 323 (Mo.App. S.D. 1994). A motion to suppress, in and of itself, preserves nothing for appeal, and ordinarily, a point relied on that refers only to a ruling on such a motion is fatally defective. ***State v. Rodgers***, 899 S.W.2d 909, 911 (Mo.App. S.D. 1995).

Beyond that, a ruling on a motion to suppress is interlocutory and subject to change during the course of the trial. ***Id.*** Therefore, a specific objection is required when the evidence is offered at trial to preserve the issue for appellate review. ***Id.; State v. Downen***, 952 S.W.2d 807, 811 (Mo.App. W.D. 1997); ***State v. Mills***, 735 S.W.2d 197, 200 (Mo.App. E.D. 1987).

In the instant case, the only seized evidence Defendant complains about is the cocaine. When the State offered that evidence at trial, the court asked Defendant's counsel if he had any objection, to which he responded, "No, Your Honor." This constituted an affirmative waiver of any objection to this evidence. ***State v. Scott***, 858 S.W.2d 282, 285 (Mo.App. W.D. 1993). Under such circumstances, plain error review is not warranted. ***Id.*** See also ***State v. Stillman***, 938 S.W.2d 287, 290 (Mo.App. W.D. 1997). This point is denied.

Defendant's second point is:

> The trial court erred in sustaining the prosecutor's hearsay objections to the co-defendant's testimony as to exculpatory statements made by [Defendant], because under Rule 401 of the Federal Rules of Evidence and statements are nonhearsay and the law was not followed in that the statements, if allowed, would have negated [Defendant's] guilt.

This point does not state what evidence the trial court allegedly erroneously excluded, or specify why the exclusion was erroneous. Rule 30.06(d) requires that a point relied on "shall state briefly and concisely what actions or ruling of the court are sought to be reviewed and wherein and why they are claimed erroneous." Three things are required to comply with the "wherein" and "why" requirements of the Rule: (1) a statement of the action or ruling complained of; (2) why the ruling was erroneous; and (3) wherein the evidence or other matter supports the position the party asserts the 'rial court should have taken. ***State v. Rabe***, 870 S.W.2d 453, 455 (Mo.App. S.D. 1994). A point written in violation of Rule 30.06(d) preserves nothing for review. ***State v. Higgins***, 852 S.W.2d 172, 175 (Mo.App. S.D. 1993). We may exercise our discretion, however, and review for plain error resulting in manifest injustice or a miscarriage of

justice. Rule 30.20.

In the argument section of his brief, Defendant identifies the excluded testimony as that of Patino during direct examination by Defendant's attorney. Specifically, he contends that the trial court incorrectly sustained hearsay objections when Patino was asked if Defendant had told him how long he had had his car; what Defendant said when they were discussing their plans; and whether defendant has asked Patino to drive the car. Defendant made an offer of proof indicating that Patino would testify that Defendant told him that he had just purchased the car and still owed $500 on it, and that Patino offered him $500 to drive him to Memphis. The offer of proof did not indicate how Patino was expected to testify concerning the questions about what Defendant said about their plans and whether he asked Patino to drive the car.

When an objection to proffered evidence is sustained, the party offering the evidence must demonstrate its relevancy and materiality by way of an offer of proof in order to preserve the matter for appellate review. ***State v. Jordan***, 699 S.W.2d 80, 83 (Mo.App. E.D. 1985). The purpose of an offer of proof is to insure that the trial court and opposing counsel understand what evidence is being offered and its relevance to the case. ***State v. Townsend***, 737 S.W.2d 191, 192 (Mo.banc 1987). The offer should be specific and in sufficient detail to demonstrate its admissibility; mere conclusions of counsel will not suffice. ***Id.***

The preferred method of making an offer of proof is to question the witness outside the presence of the jury. ***Id.*** Some Missouri courts have also allowed counsel to make the offer in narrative form by summarizing the proposed testimony of the witness. ***Id.*** It is, however, more difficult for counsel to present

a detailed and specific summary of a witness's testimony without presenting conclusions of counsel. ***Id.*** Therefore, when counsel uses the narrative offer of proof he runs a greater risk that the court will find the offer insufficient. ***Id.*** Here, Defendant's counsel did not attempt to make an offer of proof concerning two of the three issues about which Defendant sought to have Patino testify. The purported offer of proof concerning how long Defendant had owned his car did not indicate how that information would be relevant to the issues in the case. The trial court is not required to speculate on a party's reasons for introducing evidence, and may assume that the party making the offer of proof has stated it as fully and favorably as possible. ***Id.*** For these reasons alone the portion of Defendant's point dealing with this testimony is not well taken.

Defendant also complains that the trial court sustained a hearsay objection and instructed the jury to disregard Patino's

statement that when they were arrested, Defendant asked him "what have you got me into." He contends that this testimony, as well as the other purported testimony of Patino, was admissible as "admissions."

Defendant's theory is highlighted by the statement in his brief that "any statements whatsoever made by [Defendant] should have been admissible as nonhearsay admissions." He argues that an admission "is a statement or act done that amounts to a prior acknowledgment by one of the parties to an action of one of the relevant facts." He cites ***State v. Isa***, 850 S.W.2d 876 (Mo.banc 1993) for the proposition that a statement need not be against a party's interest to qualify as an admission. He extrapolates this theory from a statement in ***Isa*** that "a statement need not express an acknowledgment of guilty to qualify as an admission." Defendant, however, ignores the ***Isa*** court's

definition of an admission as "the statement or conduct of a party that tends to incriminate or connect her with the crime charged, or which manifests a consciousness of guilt." ***Id.*** at 894. ***Isa*** does not stand for the proposition that Defendant claims.

Defendant also cites ***State v. Brown***, 833 S.W.2d 436 (Mo.App. W.D. 1992) for the premise that an admission by a party is not hearsay at all under the Federal Rules of Evidence. ***Brown*** does note that an admission by a party opponent is not considered hearsay under Federal Rule of Evidence 801(d)(2). ***Id.*** at 438. Further, while the ***Brown*** court did say there was no logical reason to require that statements constituting admissions of party be "against interest," it acknowledged that statements by a party that are not unfavorable to, or contradictory to that party's position in the case, should be excluded on grounds of

relevancy. ***Id.*** at 439. Referring to the phrase "admission against interest," the ***Brown*** court said that what courts mean when using that phrase is that the statement is unfavorable to or inconsistent with the position taken by the party against whom it is offered. ***Id.*** at

In arguing that the testimony of Patino, about which he complains should have been admits "admissions," Defendant also overlooks the fact that he himself, not his opponent, was offering them. To qualify as an admission, the statement "must be offered by the opposing party." ***Id.*** at 439.

Defendant then argues that the statements in question should have been introduced on the theory that exculpatory portions of a confession or admission may not be excluded where other portions are admitted. In support, he cites ***State v. Collier***, 892 S.W.2d 686, 695 (Mo.App.W.D. 1994), where the

court recognized that remaining portions of a confession or admission may be admitted by a defendant even if they are self-serving. Defendant also points out that ***Collier*** quoted from ***State v. Beatty***, 849 S.W.2d 56, 59 (Mo.App.W.D. 1993) as follows:

> [R]elevant exculpatory statements made during a confession are admissible if other portions of the confession are used by the prosecution. "The ancient rule in this commonwealth is that the prosecution has no right to introduce selected portions of a defendant's confession and exclude those which tend to mitigate, justify, or excuse the offense charged.

892 S.W.2d at 695. Defendant, however, does not demonstrate that the statements to which he sought to have Patino testify were part of an admission or confession that had earlier been

introduced by the state. Point two is denied.

Defendant's third point avers:

> [Defendant's] trial counsel was ineffective for failing to object to the use of Defendant's statements at trial because the law as established by the Vienna Convention is that foreign national [sic] must be told of their right to speak to their counsel upon arrest and the law was not followed in that [Defendant], a Colombian National, was never informed of this right.

This point, and the argument section of his brief in support of it, make it clear that Defendant is basing his right to relief on the alleged ineffectiveness of his trial counsel. This, however, is a direct appeal and not an appeal from the denial of post-conviction relief pursuant to Rule 29.15. Rule 29.15(a) provides that it is the "exclusive procedure" for seeking relief for

claims of ineffective assistance of trial counsel. *See also* ***State v. Ricker***, 936 S.W.2d 167, 173 (Mo. App. W.D. 1996). There is no indication in this record that Defendant filed a timely motion pursuant to Rule 29.15. The failure to do so constitutes a waiver of that right. ***State v. Armstrong***, 930 S.W.2d 449, 453 (Mo.App.S.D. 1996. Because of the exclusivity of the provisions of Rule 29.15, claims for relief cognizable under that rule may not be considered when presented for the first time on appeal. ***State v. Wheat***, 775 s.W.2d 155, 157-58 (Mo.banc 1989), *cert. denied*, 493 U.S. 1030, 110 S.Ct 744, 107 L.Ed.2d 762 (1990). This point is denied.

As his fourth point on appeal, Defendant posits:

> The trial court erred in failing to provide a competent and unbiased interpreter for [Defendant], a Columbian National, because §476.060 RSMo requires such an

> interpreter, and the law was not followed at the drug-related trial where [Defendant] could not understand his first interpreter, and the Court provided a second interpreter who was an inmate at the time on drug-related charges.

Defendant has failed to preserve this allegation of error for appellate review because he did not include it in his motion for a new trial. Rule 29.11(d); ***State v. Gonzalez-Gongora***, 673 S.W.2d 811, 816 (Mo.App. S.D. 1984). Accordingly, we will review it only for plain error affecting substantial rights resulting in manifest injustice or miscarriage of justice. Rule 30.20.

Section 476.060 RSMo 1994 provides:

> The courts may, from time to time, appoint interpreters and translators to interpret the testimony of witnesses, and to translate any writing necessary to be translated in such court, or any cause therein.

Here, despite Defendant's apparent ability to communicate in English with the trooper who arrested him, the trial court appointed two interpreters for him at trial. The first, Olga Castro, was provided at the beginning of the trial. She informed the court that she was fluent in Spanish, and that she had visited with the Defendant and was able to communicate with him without difficulty. After voir dire, the trial court noted that Defendant had requested that Jose Rivera, an inmate at the New Madrid County jail be brought to the courtroom for the purpose of assisting in interpreting for him. The trial court complied and permitted Mr. Rivera to act as a second interpreter for Defendant. Mr. Rivera also acted as an interpreter for Patino when he testified. At the close of the evidence, the trial court made a record in which Ms. Castro stated that she had been able to communicate with Defendant concerning the proceedings.

After the jury reached its verdict, but before it was announced, Mr. Rivera, in answering questions from the trial court, acknowledged that he had accurately translated the proceedings for Defendant. Mr. Rivera also acted as an interpreter for Defendant at his sentencing. Significantly, during the sentencing proceedings, Mr. Rivera communicated the court's questions to Defendant, and also provided the court with Defendant's answers which were responsive to the questions posed.

Defendant does not direct us to any portion of the record indicating that either of the interpreters were incompetent or biased, the basis of his claim of error. Specifically, Defendant wholly fails to substantiate his claim that he was unable to understand Ms. Castro. He also fails to demonstrate that Mr. Rivera was not qualified or was biased. His argument that Mr.

Rivera was an inmate at the time on drug-related charges is not supported by any demonstration in the record that this affected Mr. Rivera's performance, or citation of authority that would call into question Mr. Rivera's qualifications because of that fact. Moreover, Defendant specifically requested Mr. Rivera's services.

The record does not show that either of the interpreters were deficient, but rather it strongly indicates otherwise, with the result that the court will not indulge a presumption that they were wither incompetent or biased. *See* ***Gonzales-Gongora***, 673 S.W.2d at 819.

We find no plain error, and deny this point.

In his final assignment of error, Defendant alleges:

> The trial court in denying [Defendant's] motion in liming and objection to preclude the prosecutor from referring to him

> as a Colombian because the law forbids such racial bias and improper argument to the jury and the law was not followed in that the prosecutor repeatedly referred to [Defendant] as a Colombian throughout the trial, thereby prejudicing him before the jury.

Defendant's oral motion in limine, made just before voir dire commenced, sought to prevent the prosecutor from referring to him as a Colombian or a "Southman" "due to the lack of relevance in or a prejudicial value that this is the, type of this being a cocaine charge and that being a country that is at least know [sic] for - -." The trial court denied the motion.

In the argument portion of his brief, Defendant complains that the prosecutor established that Defendant was Colombian during the state's cross-examination of Patino. In that cross-examination, Patino testified that he was from

Colombia. He was then asked, and, after Defendant's relevancy objection was overruled, testified that Defendant was also from Colombia. He also testified that at the time of the arrest, both he and Defendant lived in Chicago.

The other target of Defendant's point occurred during the State's closing argument. After pointing out that Defendant knew that the taped bundles found in the trunk contained cocaine, and after noting that Defendant told the officers that he was being paid $1,000 to make the trip, the prosecutor said:

> And that is the credible evidence that you're [sic] heard today from these two Missouri Highway patrolman [sic]. The only other evidence you've had is from an admitted criminal. Admitted dope runner. Patino comes out of the pen, he comes down here to help his buddy. Both of them from Columbia [sic]. Both of them from Chicago. Now his reasons for doing it, is it fear? Is

> it money? Is it some other reason? Well that's not an issue in this case, but it's clear, folks that he lied.

Defendant made no objection to this statement.

We note that, as with a motion to suppress, the trial court's ruling on a motion in limine is interlocutory in nature and that only an objection made at trial when the evidence is offered will preserve the issue for appellate review. ***State v. Townsend***, 898 S.W. 2d 118, 119 (Mo.App. S.D. 1995). Also, the rule in Missouri is that to preserve a matter for appeal, not only must a timely objection be made at trial, but the matter must also be raised in the motion for a new trial. ***State v. Johnson***, 536 S.W.2d 851, 854 (Mo.App. St.L. 1976). Here, Defendant objected to the cross-examination but not to the closing argument. He did not specifically raise either issue in his motion for new trial. In that motion, he referred only to the denial of his

pre-trial motion in limine, an interlocutory ruling. Accordingly, our review is only for plain error. Rule 30.20.

Defendant's argument can be summarized by the following excerpt from his brief: "[t]he prosecutor's intent was obviously to show that because [Defendant] and Patino are Colombian and not from this country, they cannot be trusted and must be involved in drugs." In support, Defendant cites ***United States v. Doe***, 903 F.2d 16 (D.C. Cir. 1990), claiming that it involves the exact issue involved here. There, two of the three defendants tried jointly on cocaine charges were Jamaican. The government's expert witness was permitted to describe the "modus operandi" of "Jamaican drug dealers" who, he testified, had had a phenomenal impact on the drug trade in the District of Columbia, and had taken over the market. ***Id.*** at 18. The prosecutor frequently referred to two of the defendants as "the

Jamaicans" during the trial, and, during closing argument, stressed the testimony that Jamaicans had "taken over" the drug traffic. ***Id.*** The defendants in that case argued that the expert's testimony was irrelevant and prejudicial because it was evidence of illegal activity by Jamaicans other than them. ***Id.*** at 19. They also contended that the state's closing argument, consisting of comments such as "Jamaicans are coming in, they're taking over the retail sale of crack in Washington, D.C." was an impermissible appeal to the jury to consider that defendants were guilty because they shared the same nationality as a member of D.C. area drug dealers. ***Id.*** at 24. The ***Doe*** court held that the testimony and remarks constituted prejudicial error requiring reversal. ***Id.*** at 27-29.

Doe is distinguishable from the instant case. Here, we are directed to no testimony or comments by the prosecutor

relating to the activities of others of Colombian descent. We are also cited to nothing in the record that could be construed as a suggestion that Defendant was untrustworthy or involved in drugs because he is Colombian. Rather, the testimony elicited from Patino, as well as the prosecutor's argument, were directed at demonstrating the relationship and ties between Patino and Defendant. This was relevant to the issue of Patino's credibility. Further, just as much emphasis was placed on their common residence in Chicago as upon their common Colombian ancestry.

With reference to the cross-examination of Patino, we note that trial courts have broad discretion to exclude or admit evidence at trial, and appellate courts will reverse that decision only upon a showing of a clear abuse of discretion. ***State v. Simmons***, 944 S.W.2d 165, 178 (Mo.banc1997), *cert. denied,* ____ U.S. ____, 118 S.Ct. 376, 139 L.Ed2d 293 (1997). The

admission of irrelevant and immaterial evidence will not result in a reversal unless there is also a showing of prejudice. ***Id.*** Under the facts of the instant case, we are unable to conclude that the testimony complained of was irrelevant or prejudicial. Accordingly, the trial court did not abuse its discretion in overruling Defendant's objection to the cross-examination of Patino. Certainly, no plain error appears.

Defendant did not object to the closing arguments he attacks in this point. Likewise, his motion for a new trial only referred to the denial of his pre-trial motion in limine. Therefore, he did not preserve the matter for appellate review and we may review only for plain error. ***State v. Bogard***, 836 S.W.2d 87, 88 (Mo.App. S.D. 1992); ***State v. Taylor***, 831 S.W.2d 266, 269 (Mo.App. E.D. 1992). Plain error, however, is seldom found in a closing argument the defendant did not object

to at trial. ***State v. Lambert***, 904 S.W.2d 582, 583 (Mo.App. S.D. 1995). In this case, the prosecutor's comments were obviously directed to the connection between Patino and Defendant, and the reasons Patino might have to testify for Defendant. We perceive nothing rising to the level of plain error requiring appellate relief. This point is denied.

The judgment is affirmed.

Phillip R. Garrison, Presiding Judge

Crow, J., and Barney, J. - concur

IN THE CIRCUIT COURT OF NEW MADRID COUNTY, MISSOURI
DIVISION I

JAIRO CARDONA RIVERA,	)	
	)	
Movant,	)	
	)	
vs.	)	Case No. CV198-303CC
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

JUDGMENT

On April 30, 1999, movant appeared in person and by Christopher J. Angles, his attorney; and respondent appeared by Michael B. Hazel, the prosecuting attorney of Pemiscot County. Evidence was adduced on movant's Rule 29.15 motion, and the court then granted the attorneys leave to submit a memorandum. The last memorandum was received on July 2, 1999.

The case is taken up again on this day and the court

makes and issues its Findings of Fact and Conclusions of Law, and incorporates them herein. For the reasons stated, the court finds that the aforesaid motion should be overruled.

IT IS, THEREFORE, ORDERED AND ADJUDGED by the court that the motion filed by Jairo Cardona Rivera under Rule 29.15 be and it hereby is overruled.

Entered this sixth day of July, 1999

/s/Paul McGhee
Special Judge

Appendix to Petition for Writ of Certiorari Judgment
In the Circuit Court of New Madrid County, Missouri

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

On November 7, 1995, the prosecuting attorney of Pemiscot county filed a complaint charging movant with the class A felony of attempted trafficking in the first degree. Movant waived his right to a preliminary examination on November 30, 1995, and he was bound over for trial. The prosecuting attorney then filed an information charging the same offense.

On December 19, 1995, the court transferred the case to New Madrid County upon application of movant. He was tried by jury in that county on an amended information wherein he was charged as a prior offender. After a one-day trial on June 6, 1996, the jury found him guilty.

The court overruled his after-trial motions on July 23, 1996, and sentenced him to imprisonment for a term of thirty

years without eligibility for probation or parole. The court advised movant of his right to proceed under Rule 29.15; and after an examination, found that no probable cause existed to believe that movant had received ineffective assistance of counsel. Defendant appealed; however, the Court of Appeals affirmed the judgment and entered its mandate on August 18, 1998. **State v. Cardona-Rivera,** 975 S.W.2d 200 (Mo.App. S.D. 1998).

On October 22, 1998, by his privately-retained attorney, movant filed a Motion to Vacate, Set Aside or Correct the Judgment or Sentence under Rule 29.15 alleging eleven grounds for relief. The filing was timely as movant filed the motion within ninety days after the date the appellate court issued its mandate. **Rule 29.15(b).** Movant did not file an amended motion, and this court held an evidentiary hearing on the original

motion.

The court notes differences in the letter designations of the subparagraphs of paragraph 8 and paragraph 9 of the motion, and uses the sequence in paragraph 8.

In the first three grounds for relief stated in paragraph 8 of the motion, movant claims that he did not receive the effective assistance of trial counsel as guaranteed to him by certain cited provisions of the
Constitution and the Constitution of Missouri; and that he was prejudiced thereby.

In paragraph 8(a) of the motion, movant alleges that his trial attorney was ineffective because he did not object at trial to the introduction into evidence by the State of the cocaine that the arresting officers seized from movant's automobile.

In paragraph 8(b), movant alleges that his trial attorney was ineffective because he did not make an adequate offer of proof as to excluded exculpatory testimony of an accomplice.

He alleges in paragraph 8(c) that his trial attorney was ineffective because he did not adequately object to the introduction into evidence of incriminating statements made by movant. He claims that he was a foreign national, and that the statements were inadmissible because they were taken without him being notified of his right to consular access under the **Vienna Convention on Consular Relations**, April 24, 1963, 21 U.S.T. 77.

Movant's remaining grounds for relief allege that the trial court committed rare and exceptional errors causing fundamental unfairness; and that the claimed errors violated various provisions of the U.S. Constitution and the Missouri

Constitution, to his prejudice.

In paragraph 8(d), movant claims trial court error in admitting into evidence an audio tape of his statement. He maintains that the statement was taken during custodial questioning after he had asked for an attorney.

Movant claims in paragraph 8(e) that the trial court erred in overruling his motion that he not be referred to as a South American or a Colombian.

The trial court error alleged in paragraph 8(f) is the overruling of movant's motion to suppress.

He alleges in paragraph 8(g) that the trial court erred because it allowed the State's evidence as to drugs; he claims that this evidence was obtained in violation of his right to be free from an unreasonable search and seizure.

In paragraph 8(h), movant claims that the trial court erred by not striking three venirepersons for cause.

In paragraph 8(i), he alleges that the trial court erred by not allowing him to question his accomplice regarding the possible criminal penalty incurred by the witness because of his testimony for movant.

In paragraph 8(j), he alleges that the trial court erred in overruling his motion for judgment of acquittal at the close of the State's case in violation of his constitutional rights.

He alleges in paragraph 8(k) that the trial court erred in overruling his motion for judgment of acquittal at the close of all the evidence in violation of his constitutional rights.

The purpose of a postconviction motion is not to relitigate the guilt or innocence of the defendant, and that sufficiency of the evidence is not to be litigated in such a

motion. **Loewe v. State,** 778 S.W.2d 331, 333 (Mo.App. 1989). Matters which are cognizable on direct appeal, such as an allegation of error in strikes of venirepersons, are not cognizable in a postconviction motion. **State v. Debler,** 856 S.W.2d 641, 647 (Mo.banc 1993). Nor can an issued that was considered on direct appeal be relitigated, even if there is a different theory presented. And, such an issue cannot be relitigated by attempting to transform it into a claim of ineffective assistance of counsel. **Hannah v. State,** 816 S.W.2d 1, 3 (Mo.App.1991).

Postconviction motions cannot be used as a substitute for a direct appeal or to obtain a second appellate review. If allegations of trial error are constitutional violations, they are not cognizable unless there are exceptional circumstances which justify not raising the constitutional grounds in the direct appeal. **State v. Redman,** 916 S.W.2d 787, 793 (Mo.banc 1996).

Harmless constitutional errors do not require reversal. The four factors set forth in **State v. Storey,** 986 S.W.2d 462, 466 (Mo.banc 1999), are reviewed in determining whether constitutional error is harmless.

On direct appeal the court reviews for prejudice, not mere error, and will reverse the case only if the error was so prejudicial that it deprived the defendant of a fair trial. To prevail on plain error review it must be shown that the error so substantially violated the defendant's rights that manifest injustice or miscarriage of justice results if the error is not corrected. **State v. Skillicorn,** 944 S.W.2d 877, 884 (Mo.banc 1997); **State v. Knese,** 985 S.W.2d 759, 770 (Mo.banc 1999).

If a request for plain error relief on an issue is denied on direct appeal, the basis for the finding of no manifest injustice established a finding of no prejudice under the **Strickland** test.

State v. Schlup, 785 S.W.2d 796, 800 (Mo.App. 1990); **State v. Williams,** 945 S.W.2d 575, 583 (Mo.App. W.D. 1997); **State v. Kelley,** 953 S.W.2d 73, 91 (Mo.App. S.D. 1997).

Rule 29.15(i) places the burden upon movant to prove his claims by a preponderance of the evidence. This court is to determine that credibility of the witnesses, and this court may believe or disbelieve the evidence whether it is contradicted or whether it is undisputed. **Bates v. State,** 967 S.W.2d 683, 683-84 (Mo.App. S.D.1998); **Dean v. State,** 950 S.W.2d 873, 876 (Mo.App. W.D. 1997).

If he is to prevail on a claim of ineffective assistance of counsel, movant must show that (1) counsel's performance was deficient in that he failed to exercise the customary skill and diligence that a reasonably competent attorney would have exercised under the same or similar circumstances, and (2) the

deficient performance prejudiced him. Prejudice results to a defendant when the acts or omissions of his attorney are outcome-determinative. Movant must demonstrate a reasonable probability that, but for the errors of counsel, the result of the trial would have been different. **State v. Miller,** 981 S.W.2d 623, 633 (Mo.App. W.D. 1998); **State v. Myers,** 989 S.W.2d 594, 598 (Mo.App. E.D. 1999). He must show that his counsel failed both the performance and prejudice prongs of the **Strickland** test, and if he fails to satisfy either prong, then the other need not be considered. **State v. Simmons,** 955 S.W.2d 729, 746 (Mo.banc 1997).

A search or seizure without a warrant is valid if it is made with proper voluntary consent. To establish consent, the State must prove that: (1) the person giving the consent did so voluntarily, and (2) that the consenter had authority to do so. A

search based on consent is valid if the officers reasonably believed the person giving consent had authority to do so, regardless of whether the belief is later proved to be erroneous. **State v. Moore,** 972 S.W.2d 658, 660 (Mo.App. S.D. 1998). Authority to give consent rests upon mutual use and joint access or control of property by an individual, not property law. **Id.** at 661. The driver of an automobile has the authority to consent to the search of the automobile. **U.S. v. Eldridge,** 984 F.2d 943, 948 (C.A. 8 1993).

An appellate court does not substitute its discretion for that of the trial court, and it determines only whether there was sufficient evidence to support the ruling of the trial court. An appellate court will reverse only if the trial court's judgment is clearly erroneous. **State v. Peterson,** 964 s.w.2d 854, 856 (Mo.App. S.D. 1998).

Trial counsel cannot be deemed ineffective for failing to make an objection that has no merit. **State v. Bickham,** 917 S.W.2d 197, 199 (Mo. App. W.D. 1996). Nor does a failure to object to everything that is objectionable demonstrate that the attorney is incompetent. The decision not to object may be a strategic decision, or it may be an inadvertence, rather than incompetence. A failure to make a meritorious objection demonstrates incompetence only if the remaining record shows that the overall performance of the attorney fell short of the established norms. **State v. Elder,** 901 S.W.2d 87, 91 (Mo.App. W.D. 1995). Before a movant can obtain relief on the ground that his attorney failed to object, the failure must have been of such character as to deprive him of his right to a fair trial. **State v. Rich,** 950 S.W.2d 337, 340 (Mo.App. W.D. 1997).

In his memorandum, movant's attorney cites **State v. Joos,** 735 S.W.2d 776, 784 (Mo.App. 1987), which mentions the **Vienna Convention on Diplomatic Relations** of 1961, 23 U.S.T. 3227, on footnote 5, on a point unrelated to this case. This may be the only reported Missouri case referring to **any** Vienna Convention prior to movant's direct appeal. He also invites the court's attention to the concurring opinion in **Breard v. Pruett,** 134 F.3d 615, 621 (C.A.4 1998), as to the importance of honoring the Vienna Convention. He cites the case of **Murphy v. Netherland,** 116 F.3d 97 (C.A.4 1997), as holding that the Vienna Convention issue should have been discovered upon a reasonably diligent investigation by the attorney for the defendant. In **Murphy,** the court questioned that the Vienna Convention created individual rights as opposed to the setting out of the rights and obligations of the signatory nations. The

court observed that the Supremacy Clause does not covert violations of treaty provisions into violations of constitutional rights. **Id.** at 100.

While decisions of the United States Courts of Appeals are given respectful consideration, they are not generally binding on the State courts of Missouri. **State v. Cammon,** 959 S.W.2d 469, 473 (Mo.App. S.D. 1997).

The earliest reported cases involving the failure by State authorities to inform a criminal defendant under the Vienna Convention may be **Faulder v. Johnson,** 81 F.3d 515 (C.A.5 1996). The opinion in this case, handed down on April 10, 1996, held that a conceded failure to advise Faulder of his rights under the Convention did not merit reversal. **Id.** at 520. A petition for writ of certiorari was denied by the U.S. Supreme Court under the same name at 519 U.S. 995, 117 S.Ct. 487, 136

L.Ed.2d 380. Another petition for writ of certiorari was denied by the Supreme Court on January 25, 1999, in **Faulder v. Texas,** 119 S.Ct. 909. According to news reports, Faulder was executed by the State of Texas on June 17, 1999.

In **Breard v. Greene,** 523 U.S. 371, 118 S.Ct. 1352, 140 L.Ed.2d 529, the court observed that even had the Vienna Convention claim been properly raised and proven, it is doubtful that the violation should result in the overturning of the final conviction without some showing that the violation had an effect on the trial. 118 S.Ct. at 1355. The court denied relief, and Breard is reported to have been executed by the State of Virginia.

This court is not aware of the reversal of any criminal case upon the ground that statements made by a foreign national to State authorities without first being informed of a right to

access to a counsel of his nation were inadmissible in a criminal prosecution.

All of the cases cited in the State's memorandum were decided in 1998 and 1999, and they were not available to trial counsel. The effectiveness of the assistance by counsel is measured against the backdrop of the law at the time of trial, and it cannot be based on trial counsel's failure to anticipate changes in the law. **State v. Cunningham,** 863 S.W.2d 914, 921 (Mo.App. E.D. 1993); **Hawkins v. State,** 854 S.W.2d 606, 607-08 (Mo.App. S.D. 1993); **Lamastus v. State,** 989 S.W.2d 235, 237 (Mo.App. E.D. 1999).

An argument that a defendant is a foreigner is permitted if it is not clearly an appeal to bigotry, but rather is an appeal to justice. **State v. Worstell,** 767 S.W.2d 352, 357 (Mo.App. 1989).

In matters that involve the admission of evidence, an appellate court on direct appeal reviews for prejudice and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial. **State v. Crump,** 986 S.W.2d 180, 188 (Mo.App. E.D. 1999).

Neither a motion to suppress or a motion in limine preserves anything for appeal as the ruling on such motions are interlocutory and subject to change during the course of the trial. **Cardona-Rivera,** 975 S.W.2d at 203 and 207.

Improper jury selection is a trial court error that is not cognizable in a Rule 29.15 proceeding unless it is shown that the defendant had no knowledge of the improper jury selection process until after the trial. Before relief can be granted as to the qualification of a juror it must be shown that a biased person actually served as a juror. **State v. Colbert,** 949 S.W.2d 932,

944 (Mo.App. W.D. 1997).

It is not the function of the trial judge to assist counsel in trying their case, and the judge should act sua sponte only in exceptional circumstances. **State-v. Finster,** 985 S.W.2d 881, 892 (Mo.App. S.D. 1999). The trial court has broad discretion to determine the qualifications of prospective jurors, and only clear abuse of discretion will justify reversal of a case. **State v. Parker,** 886 S.W.2d 908, 919 (Mo.banc 1994); **State v. Murphy,** 989 S.W.2d 637, 640 (Mo.App. E.D. 1999).

In ruling on the motion for directed verdict, a trial court is limited to determining whether there is sufficient evidence from which reasonable persons could find the defendant guilty. A directed verdict is authorized only where there is no evidence sufficient to support a guilty verdict. **State v. Small,** 873 S.W.2d 895, 896 (Mo.App. E.D. 1994).

The validity of the search of movant's automobile and the seizure of the cocaine was litigated in a federal court suppression hearing and in a suppression hearing in the trial court. Both courts refused to suppress the evidence. Whether the trial attorney did not object to the admission of the cocaine into evidence at trial because of inadvertence, or because he believed that an objection would be futile, is not determinative of the effectiveness issue. There is no reason to believe that the trial court would have reversed its ruling had an objection been made. Nor is there reason, based on the case law, to believe that the appellate court would have reversed the ruling of the trial court had the issue been properly raised and preserved by the trial attorney. The appellate court stated in the direct appeal that plain error review was not warranted. This court does not find prejudice to movant on his claim in paragraph 8(a), and

concludes that he is not entitled to relief thereon.

The claim in paragraph 8(b) that the trial court erred in its ruling on admissibility of testimony by an accomplice as to movant's statements that were exculpatory of movant, was considered on plain error review in the direct appeal. The appellate court concluded that the point dealing with the testimony of the accomplice was not well taken. There are no exceptional circumstances requiring this court to revisit this issue which is now couched in terms of ineffective assistance of counsel. It is clear that there was no error that deprived movant of a fair trial, and he is entitled to no relief on this claim.

The trial attorney was not ineffective for failing to object to the admission of movant's statement into evidence on the ground that the statement was taken without him being informed of his alleged right to consular access under the Vienna

Convention. That this issue apparently had never been presented to an appellate court in Missouri before movant's direct appeal, leads to the conclusion that criminal defense attorneys generally were unaware of the possibility that this could be a viable objection. Movant's trial attorney was not required to anticipate that in the future some court might rule that statements taken from foreign nationals are inadmissible if the defendant had not been first informed of his right to consular access. The failure of the trial attorney to make this objection did not constitute a failure to exercise the customary skill and diligence that a reasonably competent attorney would have exercised in the case.

The sketchy evidence at the hearing about action taken by a Colombian consul does not indicate much interest in helping movant. It is not apparent what assistance a consul would have rendered had movant been informed of his claimed

right to access, and no prejudice to him is shown.

It is not clear that movant is entitled to the protection of the Convention. The court accepts his testimony that he was born in Colombia and has been in the United States since 1984, but does not know that he is a foreign national, even though he claims that he is not a citizen. He spoke English when he was arrested, and he had an Illinois driver's license and registration for his automobile. He told the arresting officers that he was born in Puerto Rico, and his accomplice made a similar claim. Puerto Ricans are U.S. citizens, and they are not foreign nationals. The arresting officers were not required to inform a person claiming to be a citizen of this country that he had a right to consular access. Movant is not entitled to relief on his claims in paragraph 8(c).

Movant has not pointed out evidence, or made an

argument, that supports his claim in paragraph 8(d) as to the admission of the audio tape into evidence. The court finds nothing that required the trial court to intervene sua sponte, and finds no error so prejudicial that it deprived movant of a fair trial. He is not entitled to relief on his allegations in paragraph 8(d).

The overruling by the trial court of the motion in limine that movant not be referred to as a South American or a Colombian was reviewed for plain error, and denied, in the direct appeal. The references were not an appeal to bigotry, and there is no showing that movant is entitled to relief on this claim in a postconviction proceeding. His allegation in paragraph 8(e) entitles him to no relief.

The interlocutory ruling on the motion to suppress was not appealable, and it cannot be considered on postconviction

review. Therefore, movant is not entitled to relief on this claim in paragraph 8(f).

The allegation in paragraph 8(g) is a restatement in a different form of movant's complaint in paragraph 8(a) about the admission of the cocaine into evidence. Because there were no exceptional circumstances requiring the trial court to intervene sua sponte; and in the absence of a showing of prejudice, the court finds that movant is not entitled to any relief on his claim in paragraph 8(g). The allegation in paragraph 8(h) does not state facts that are sufficient to support a claim for relief. This complaint about juror selection was for the direct appeal, and there is no showing of any right to postconviction review of the allegation. Neither is there a showing of clear abuse of discretion by the trial court, that a biased person actually served as a juror, nor that there was a real probability of prejudice. This

claim is without merit.

The complaint in paragraph 8(i) concerns a trial court ruling on the admissibility of evidence. In a direct appeal of this issue, the appellate court would review for prejudice and reverse the case only if the filing was erroneous and so prejudicial that it deprived movant of a fair trial. The ruling should not be considered in this proceeding in the absence of exceptional circumstances. This court finds no exceptional circumstances and that the ruling did not deprive movant of a fair trial. Movant is not entitled to relief on this claim.

Movant is not entitled to relief on the claims stated in paragraphs 8(j) and 8(k) as to the overruling of his motions for judgment of acquittal. They are attempts to challenge the sufficiency of the evidence, which was for the direct appeal. The sufficiency of the evidence was not challenged in the direct

appeal, and it cannot be challenged now. The rulings on the motions by the trial court were correct as there was ample evidence to support the guilty verdict. There is no prejudice to movant arising from these rulings.

The trial attorney exercised the customary skill and diligence that a reasonably competent attorney would have exercised in the case. Movant did not prove that he had received ineffective assistance from the attorney. Nor did he show that any acts or omissions by his attorney prejudiced him.

The court finds no exceptional circumstances requiring a grant of relief on any of the allegations of trial error. Movant did not prove any of this claims by a preponderance of the evidence, and the court finds that he is not entitled to relief on his claims.

The court further finds that the sentencing court had jurisdiction to render the judgment and impose the sentence; that the sentence imposed was not in excess of the maximum sentence authorized by law, nor was it illegal; that the conviction and sentence imposed did not violate the laws or the constitution of this State, or the constitution of the United States; and that there was no denial or infringement of the constitutional or other rights of movant, including the right to effective assistance of counsel, so as to render the judgment or sentence subject to collateral attack.

For the foregoing reasons the court finds that the Rule 29.15 motion filed by movant should be overruled.

/s/Paul McGhee
Special Judge

Appendix to Petition for Writ of Certiorari Appeal
from the Circuit Court of New Madrid County, Missouri

Missouri Court of Appeals
Southern District
Division Two

JAIRO CARDONA-RIVERA, Appellant, vs. STATE OF MISSOURI, Respondent.	)	No. 23118

APPEAL FROM THE CIRCUIT COURT OF NEW MADRID COUNTY

Honorable Paul McGhee, Special Judge

(Before Crow, J., Garrison, J., & Barney, C.J.)

AFFIRMED.

PER CURIAM. Jairo Cardona-Rivera ("Movant") appeals from a judgment of the Circuit Court of New Madrid County denying his Rule 29.15 motion to vacate, set aside or correct a prior judgment and sentence for trafficking in the first

degree as a prior offender. He received a prison term of 30 years without eligibility for probation or parole.[1] § 195.222.2(2), RSMo Cum. Supp. 1993; *see* ***State v. Cardona-Rivera***, 975 S.W.2d 200, 202 (Mo.App. 1998). Movant raises two points of motion court error. He first contends that the motion court erred in overruling his post-conviction relief motion because his trial counsel was ineffective for failing to object, pursuant to the Vienna Convention on Consular Relations ("Vienna Convention"), to use of Movant's "statements." He contends he was prejudiced by his trial counsel's purported failure because without these "statements" he "would probably have been acquitted." In his second point, Movant contends that motion court erred in overruling his Rule 29.15 motion because his trial

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[1]All rule references are to Missouri Court Rules (2000).

counsel was ineffective at trial for failing to object to the admission of the "unlawfully seized cocaine." Movant asserts he was thereby prejudiced because absent the cocaine evidence his case would have been dismissed or he likely would have been acquitted.

We do not disturb a motion court's judgment denying post-conviction relief unless we determine its findings and conclusions are clearly erroneous. ***Sitton v. State***, 17 S.W.3d 917, 920 (Mo.App. 2000). "[W]e will find the motion court's determination clearly erroneous only if a review of the entire record leaves a definite and firm impression that a mistake has been made." ***Id.*** Movant must demonstrate that there is a reasonable probability that, absent the alleged error, the jury would have had a reasonable doubt as to guilt. ***Id.***

In our review of Movant's first point, he appears to argue

that inculpating statements made to state troopers, at the scene of his arrest and when bundles of cocaine were found in a suitcase in the trunk of his car, should be suppressed because he was not warned of his alleged rights under Article 36(1)(b) of the Vienna Convention to have the Columbian [sic] consulate notified of his arrest.[2] Even assuming *arguendo* that at the time

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[2]*See* Vienna Convention on Consular Relations (Vienna Convention), April 24, 1963, [1970] 21 U.S.T. 77, T.I.A.S. No. 6820. Article 36(1)(b) sets out that:

> [I]f he so requests the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

of the arrest Movant met the foundational requirements showing that he, indeed, was a citizen of Columbia [sic], we nevertheless find that Movant's first point has no merit.[3]

As best we can ascertain, the contention asserted by

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[3]The record shows that Movant spoke English with the state troopers at the time of his arrest, albeit with an accent. He admitted that he was the vehicle's owner and produced a registration confirming his ownership. He also related, apparently in English, that he did not know the driver's name, where the trip originated or where they were going. *See* ***Cardona-Rivera***, 975 S.W.2d at 202. Trooper Elfrink read Movant his Miranda rights and Movant acknowledged these rights by saying "yes and nodd[ing] his head." *See* ***Miranda v. Arizona***, 384 U.S. 438, 444-45, 86 S.Ct. 1602, 1612, 16 L.E.2d 694, 706-07 (1966). During the hearing on the federal suppression motion (later adopted in the state proceedings), Trooper Heath was asked: "And you had already ascertained [at the arrest site] that Mr. Rivera was a foreign-national?," and answered, "No, sir, I do not believe he ever gave me any kind of credential in that." As best we can glean, the record is devoid of any indication that Movant ever informed the state troopers that he was a Columbian [sic] citizen, particularly at the time of his arrest. Lastly, in his post-conviction relief hearing, Movant testified that he had lived in the United States since 1984.

Movant in his first point of motion court error is a matter of first impression in the State of Missouri.[4] We note that "[t]he [United States] Supreme Court has treated the issue of whether [the Vienna Convention] creates any judicially enforceable rights as an open question . . . ." ***U.S. v. Lombera-Camorlinga***, 206 F.3d 882, 885 (9th Cir. 2000). ***Lombera-Carmorlinga***, *supra*, involved similar facts and contentions as those found in the instant case. In ***Lombera-Carmorlinga*** a Mexican national charged with drug offenses moved to suppress evidence of his post-arrest statements, on the basis that he had not been informed of his rights under the Vienna Convention to notification of his consulate. After his motion was denied, and after his conviction on drug charges, he appealed to the 9th

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[4]***State v. Joos***, 735 S.W.2d 776, 784 (Mo.App. 1987) made but tangential reference to the Vienna Convention and only in the context of diplomatic immunity, a subject not implicated in the review of the instant case.

Circuit Court of Appeals. The court en banc observed that "the treaty does not link the required consular notification in any way to the commencement of police interrogation." ***Id.*** at 886. "Nor does the treaty, as ***Miranda*** does, require law enforcement officials to cease interrogation once the arrestee invokes his right." ***Id.*** The court noted that "while the rights to counsel and against self-incrimination are secured under the Fifth and Sixth Amendments to our own Constitution and are essential to our criminal justice system, they are by no means universally recognized or enforced." ***Id.*** "[E]ven today European countries typically afford no right to counsel during police questioning." ***Id.*** (citing Gordon Van Kessel, "*European Perspectives on the Accused as a Source of Testimonial Evidence*," 100 W. Va. L. Rev. 799, 810 (1998)). The court en banc also observed that "[t]here is no reason to think that

drafters of the Vienna Convention had [unique] American rights in mind, especially given the fact that even the United States Supreme Court did not require Fifth and Sixth Amendment post-arrest warnings until it decided ***Miranda*** in 1966, three years after the treaty was drafted." ***Lombera-Camorlinga***, 206 F.3d at 886. The court en banc concluded: "assuming that some judicial remedies are available for the violation of Article 36, the exclusion in a criminal prosecution of evidence obtained as the result of post-arrest interrogation is not among them." ***Id.***; *accord* ***U.S. v. Li***, 206 F.3d at 56, 60 (1st Cir. 2000) ("We hold that irrespective of whether or not the treaties create individual rights to consular notification, the appropriate remedies do not include suppression of evidence or dismissal of the indictment.").

While we recognize that the foregoing federal authorities

are generally not binding on Missouri state courts, ***Futrell v. State***, 667 S.W.2d 404, 407 (Mo. Banc 1984); ***State v. Cammon***, 959 S.W.2d 469, 473 (Mo.App. 1997), their analysis and conclusions are particularly compelling in the context of our review of Movant's claim of error. Accordingly, we adopt their rationale. Movant suffered no prejudice by not having been informed of the provisions of Article 36 of the Vienna Convention after his arrest. Point denied.

In his second point, Movant posits that his trial counsel was ineffective for failing to object at trail to the admission of the seized cocaine found in a suitcase in the trunk of Movant's vehicle.

"In order to prevail on a claim of ineffective assistance, appellant must prove by a preponderance of the evidence that counsel was ineffective by failing to exercise the customary skill

and diligence that a reasonably competent attorney would exercise in similar circumstances, and that appellant was prejudiced as a result." ***State v. Clay***, 975 S.W.2d 121, 135 (Mo. banc 1998), cert. denied, 525 U.S. 1085, 119 S.Ct 834, 142 L.E.2d 690 (1999); *see* ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); ***Sanders v. State***, 738 s.W.2d 856, 857 (Mo. banc 1987). "There are two, separate requirements embodied in this analysis. Counsel must have been ineffective and, in addition, the ineffectiveness must have prejudiced the appellant. If either of these requirements is not met, then a claim for ineffective assistance will fail." ***Clay***, 975 S.W.2d at 135.

"To prove prejudice, the movant must show a 'reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.'" ***Shurn***, 866 S.W.2d at 468 (quoting ***State v. Ervin***, 835 S.W.2d 905, 929

(Mo. banc 1992)). "In arguing ineffectiveness, appellant must overcome a strong presumption that counsel's performance was sound trial strategy." ***Clay***, 975 S.W.2d at 135. The standard for judging ineffective assistance for failure to object is clear:

> In many instances seasoned trial counsel do not object to otherwise improper questions or arguments for strategic purposes. It is feared that frequent objections irritate the jury and highlight the statements complained of, resulting in more harm than good.

State v. Tokar, 918 S.W.2d 753, 768 (Mo. banc 1996). "The movant must prove that a failure to object was not strategic and that the failure to object was prejudicial." ***Clay***, 975 S.W.2d at 135. "Counsel will not be deemed ineffective for failing to make nonmeritorious objections." ***Id.***

The record shows that Movant's counsel filed two motions to suppress the evidence found at the arrest scene: once during the course of federal prosecution proceedings against

Movant in the United States District Court, as well as during the course of his state prosecution in the Circuit Court of New Madrid County.[5] Movant did not prevail in either forum. The record leaves little doubt that the state troopers were aware that Movant owned the vehicle. The record also reveals that the troopers at the scene asked the driver of the vehicle for his consent to the search of the vehicle. He granted it. Movant, however, took no steps to protest the search, either physically or verbally. Indeed, Movant complied without protest when asked to step outside of his vehicle and move to the front of the vehicle. Trooper Heath testified during the suppression hearing that "I advised him that I was gonna search and he willingly exited the vehicle and did exactly what I asked and didn't object

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[5]As best we can glean from the record due to apparent violation of time requirements for prosecution, the federal case against Movant was dropped.

in any way." Furthermore, Movant later cooperated with the troopers at the scene in identifying the cocaine found in the suitcase in the trunk of his vehicle.[6]

"Whether a consent was voluntary or was the product of duress or coercion, expressed or implied, is a question of fact to be determined from the totality of the circumstances . . . ." ***State v. Peterson***, 964 S.W.2d 854, 857 (Mo.App. 1998). "Missouri law recognizes that authority to give consent rests upon mutual use and joint access or control of property by an

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[6]After reading Movant his ***Miranda*** rights, the state troopers engaged Movant in a conversation in English. At first he denied knowing what was in the suitcase. Subsequently, he cooperated with state troopers and acknowledged that the bundles found in the suitcase were cocaine. According to state trooper Elfrink, he said "you know it's clocaine [sic] and he said it with an L in the pronunciation." He also indicated that he was getting paid a thousand dollars to deliver the cocaine and told Trooper Elfrink that there "was six or seven kilos" of cocaine in the suitcase.

individual, not property law." ***State v. Moore***, 972 S.W.2d 658, 661 (Mo.App. 1998).[7] Based on the totality of the circumstances, including the driver's consent to the search of the vehicle and coupled with Movant's tacit and uncoerced consent to the search, we fail to see where Movant was prejudiced by his trial counsel not objecting to the admission of the cocaine into evidence. *See* ***Clay***, 975 S.W.2d at 135. "Counsel cannot be ineffective for failing to make a nonmeritorious objection." ***State v. Bickham***, 917 S.W.2d 197, 199 (Mo.App. 1996). "That an attorney does not object to everything objectionable does not demonstrate incompetence." ***State v. Elder***, 901 S.W.2d 87, 91 (Mo.App. 1995). "That an attorney does not make a meritorious objection does not demonstrate incompetence unless the

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[7]When asked if the bags found in the vehicle belonged to the [sic] him, the driver stated that "he didn't want to make anymore statements until he talked to an attorney."

remaining record establishes that the attorney's overall performance fell short of established norms and that this incompetence probably affected the result." ***Id.***

Movant is not entitled to any relief because we find no indication of overall incompetence in his attorney's defense of his case. *See* ***Id.*** Our review of the entire record does not leave us with a definite and firm impression that a mistake has been made. ***Sitton***, 17 S.W.3d at 922. Point denied.

The judgment of the motion court is affirmed.

Petition for Writ of Certiorari
Letter from Missouri Court of Appeals

MISSOURI COURT OF APPEALS

SOUTHERN DISTRICT

300 Hammons Parkway
SANDRA L. SKINNER SPRINGFIELD, MISSOURI 65806-2518 TELEPHONE
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SUSAN PATTON FAX
CHIEF DEPUTY CLERK 417-895-6817
KAREN CREIGHTON
DEPUTY CLERK

December 4, 2000

Mr. Christopher J. Angles
Attorney at Law
1125 Grand, Suite 1500
Kansas City, MO 64106

Re: Jairo Cardona-Rivera, Appellant
vs. State of Missouri, Respondent
Case No. 23118-2

Dear Mr. Angles:

Today's date the Court has issued the following order in the above case:

> "Now on this day, the Court, having fully considered appellant's motion for rehearing or to transfer this cause to the Supreme Court of Missouri, does overrule said motion for rehearing and does deny said application for transfer."

Sincerely yours,

/s/ Sandra Skinner
SANDRA L. SKINNER, Clerk

SLS/ss
cc: Mr. John M. Morris

IN THE SUPREME COURT OF MISSOURI
SC83239
SD23118

January Session, 2001

Jairo Cardona-Rivera,

Appellant,

vs. (TRANSFER)

State of Missouri,

Respondent.

Now at this day, on consideration of the appellant's application to transfer the above-entitled case from the Missouri Court of Appeals, Southern District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court,

entered of record at the January Session, 2001, and on the 23rd day of January, 2001, in the above-entitled cause.

Appendix to Petition for Writ of Certiorari

In the Supreme Court of Missouri, Application for Transfer

Given under my hand and seal of
Said Court, at the City of Jefferson,
this 23rd day of January, 2001.

/s/Thomas Simon _____ Clerk

_____ D.C.

Article VI(2)

[2] This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when the actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.